THE NEW YORK EMPLOYERS' LIABILITY ACT.

IN the recent case of *Ives* v. *South Buffalo Railway Company*,[1] the New York Court of Appeals annulled upon constitutional grounds, the so-called Wainwright Workmen's Compensation Law which sought to impose upon employers in certain specified extra-hazardous occupations[2] a limited liability[3] in cases of injuries to their employees regardless of the fact as to whether the negligence of the latter might have contributed to the injury or whether the risk had been well understood and assumed. The act did not abolish or modify the common law liability of the employer in cases where contributory negligence or assumption of risk could not be pleaded or relied upon. It did, however, provide that the employee or his next of kin must in all cases make an election of the remedy he sought within a reasonable time after the accident, and that a resort to the common law remedy, even though unsuccessful, would be a bar to the relief provided by the statute, and in like manner a resort to the relief afforded by the statute would amount to a waiver of the common law right. This statute the court held to be unconstitutional, not because of its unreasonableness or lack of economic necessity, but because of its revolutionary nature. The judges assumed and held that the standards of social responsibility which were recognized and enforced at the time of the adoption of our

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[1] 94 N. E. 431.

[2] The employments specified were: (1) The erection or demolition of any bridge or building in which there is, or in which the plans and specifications require, iron or steel frame work; (2) The operation of elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of materials in connection with the erection or demolition of such bridge or building; (3) Work on scaffolds of any kind elevated twenty feet or more above the ground, water, or floor beneath in the erection, construction, painting, alteration or repair of buildings, bridges or structures; (4) Construction, operation, alteration or repair of wires, cables, switchboards or apparatus charged with electric currents; (5) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry; (6) The operation on steam railroads of locomotives, engines, trains, motors or cars propelled by gravity or steam, electricity or other mechanical power, or the construction or repair of steam railroad tracks and road beds over which such locomotives, engines, trains, motors or cars are operated; (7) The construction of tunnels and subways; (8) All work carried on under compressed air.

[3] The compensation provided for was as follows: In case of death and if a widow or next of kin left wholly dependent upon earnings of the deceased, twelve hundred times the daily earnings of the latter; if partially dependent, then a proportionate sum; if no dependents left, then medical and funeral expenses not to exceed two hundred dollars; if totally or partially disabled, a weekly payment equal to fifty per cent of his average weekly earnings, the amount in no case to be greater than the amount the injured workingman would have earned before the injury, and the weekly payment in no case to exceed more than ten dollars a week nor to extend over eight years.

state and federal constitutions were perpetual unless changed by constitutional amendment, and that our constitutions have forever guaranteed that there shall be no civil or criminal liability where there is no breach of a positive duty. "When our constitutions were adopted," the opinion said, "it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. * * * Under our form of government courts must regard all economic, philosophical and moral theories, however attractive and desirable they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the spirit of our written constitutions. * * * The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. * * * The statute judged by our common law standard is plainly revolutionary. * * * This is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the federal and state constitutions."[4]

Coming, as this decision did, at the time when the country was horrified over the awful tragedy of the New York Washington Place factory fire, a "rain of scorched bodies" which, to use the language of the Philadelphia North American, "was caused by a defect in our civilization—the perverted view that places property right above human right," it naturally aroused much comment both antagonistic and favorable. On the one side the New York Daily People[5] indignantly asserted that "the human bonfire on Washington Place illuminates the decision; the decision pronounces the bonfire constitutional"; the Philadelphia North American charged the judiciary with "a narrow, technical, letter-worshipping reasoning, and a total inability to recognize modern industrial conditions," and even the less radical New York Evening Post asserted that "the constitutional prohibition directed against the taking of property without due process of law may be a desirable defense of property rights, just as the constitutional privilege of refusing self-incriminating testimony may be a desirable defense of personal rights; but the remote inferences which flow from investing these doctrines with a sacro-sanct character are no more essential to the fundamental idea of property rights or of personal rights than are the minutiae of ecclesiastic ritual to the

[4] The opinion conceded, however, that reasonable regulations could be prescribed for the safeguarding of life and health, and that for disobedience to these regulations employers could be held liable both criminally and civilly.

[5] Socialist.

fundamental idea of religion." On the other side, the Boston Advertiser said that "the too prevalent assumption that legislation is superior to all restraining force in the fundamental law is dangerous not only to law, but in the end, to human welfare. If such legislation were allowed to pass unchallenged, in time not merely 'commendable impulses of benevolence or charity' but positively injurious and inhumane laws would be finding their way on the statute-books. The halt is called, and it is time. * * * The theory that a legislature can properly assume that the conduct of business is a crime and that penalties are to be visited upon men simply because they are employers, is killed."[6]

The majority of these comments are misleading and fall short of the mark. On the one side, they tend to give the impression of an undemocratic and unsympathetic court, and on the other, of the existence of property rights, which as a matter of fact have at no time existed. The real fact is that our courts are not, and never have been, irresponsive to the popular impulses and to the popular ideals, but rather, have reflected them. The inaction of the press, indeed, in relation to the recent factory fire in New York, is typical of the situation. We always find a spasm of indignation after a horror of this kind, and a large measure of self contrition, but like the contrition of the habitual drunkard who is momentarily brought to his senses by some catastrophe, it is but short-lived, and the customary methods of thought and of action soon again prevail. We would almost venture the assertion that there is hardly a newspaper building in New York whose owners rigidly comply with the fire ordinances, and that the press of the country as a whole is winking every day at violations of statutes and of ordinances which prohibit the em-

[6] Among the other comments are the following:

"The rights of property are defined, limited, and declared by statute; no more, no less. The rights of life are fundamental, and superior altogether to the rights of property." Louisville Post.

"The human bonfire on Washington Place illuminates the decision; the decision pronounces the bonfire constitutional." New York Daily People.

"The almost simultaneous occurrence of these two events is a truly frightful symbol of the actual situation of the American working class." New York Call.

"You may go on murdering as many workingmen and women and children as you find necessary in order to extract the last possible dollar profit out of your respective businesses. We, the judges enthroned in supreme political power, rule that the people can not, through their chosen legislative representatives, curb your lust for gold and blood." New York Call.

"The real battle will not come and the great victory will not be won by these reformers until they rewrite the constitutions to recognize that human rights rank first, always. Property rights are so firmly entrenched in our constitutions and laws and customs and traditions that they will not be dislodged except after long and patient struggle." Des Moines Register and Leader.

"Even the most zealous advocates of the law and its underlying principle can not find in the action of the court the slightest excuse for criticism." New York Times.

ployment of young children, which regulate the sale of intoxicating liquors, which regulate the hours of employment and which otherwise restrain the assumed right of the business man to "manage his own business as he pleases." Our judges, indeed, are not, and never have been, undemocratic, that is to say, if democracy consists in carrying out the will of the governing majority. As a people we have been individualists and it is not a matter of surprise that our courts should have reflected the fact. Our controlling vote has been the business and the farmer vote, and, except in the matter of the regulation of railroad rates, the farmer and the business man is, and always has been, a conservative and an individualist. We are a nation of property owners and therefore conservative. The courts have sustained labor laws as soon as the people have really been behind them. We as a nation have clung persistently to a belief in, and to the ideal of, the actual existence of an equality of contractual ability and opportunity in the industrial world. We have therefore come but slowly to see the necessity for legislative interference in the field of industry. We have thought but little of the laboring man and of the "under dog" because we have led ourselves to believe, and have liked to believe, that his condition is the result of his own faults. We have been humane and have been ever ready to respond generously with palliatives in cases of fires, mine explosions and similar catastrophes. We have, however, been slow to furnish preventives because we have lacked in knowledge, solicitude, and love. The labor laws, indeed, which the courts have held invalid have usually been log-rolled and have usually been passed before their time. They, as a rule, have had no real public sentiment behind them. The legislative leaders as a rule, have allowed them to pass and to be placed upon the statute books only because they have been certain that the courts would yield to the dominant public sentiment and would hold them invalid, and that by supporting them they could gain votes for themselves and for measures in which they were themselves interested.[7]

[7] The extent to which this legislative juggling is carried on, and its consequent injustice to our judges is seldom recognized. The American courts, indeed, are constantly being made the cat's-paws of the politicians. They are being constantly blamed for a lack of sympathy and democracy and for overruling the judgment of the legislatures when they are merely reflecting the popular conscience and the popular will and are doing the very thing which the legislatures themselves expected them to do. It is a noticeable fact, indeed, that in the history of English law the judge-made law has on the whole been much more democratic and humane than that which has been made by legislature or parliament. We criticise the safe-guards which the criminal law affords to the defendant and the fact that they were originally judge-made. We should remember, however, that they were merely the offset to a brutal and sanguinary penal code. When indeed, a class-blinded parliament made one hundred and sixty offenses capital and the stealing of a sheep, the shooting of a hare, and the beg-

The situation in America, is, and always has been, radically different from that to be found in England and in Germany. In Germany the ideal has been the scientific and the national, and the control of public affairs has been in the hands of the aristocratic, the military, and the learned classes. There they have learned the wisdom and the value of the conservation of the natural resources of able-bodied men and the economic wastefulness of a pauper class. They have learned that in order to compete with their rivals in trade and to keep their frontiers clear from the armies of their enemies, it is necessary to conserve men as well as things. There the ideal has been to prevent not merely loss of life, but pauperism, and to make every citizen an effective industrial and fighting unit. In England the con-

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ging of an old soldier upon the street, punishable by death, the humaner judge sought to give the accused fair play and every opportunity for defense, and to prevent if possible the execution of the innocent. It is well, too, to remember that so deeply was this class feeling and lack of humanity and democracy implanted in the British squirearchy that the battle for reform had to be extended well into the last century and, as a matter of fact, is even now far from won. After a lifetime of effort, indeed, all that so great a reformer and advocate as Sir Samuel Romilly was able to point to in the way of actual and tangible results, was the repeal of two of the statutes of the reign of Elizabeth. One of these was repealed in 1808, and the other in 1812. One made pocket-picking a capital offense, and the other made the begging of an old soldier or mariner upon the public streets equally punishable by death. It is well to remember that practically all of the redress for personal injuries which the employee now has was given to him by the courts. The rules of law which make the master liable in damages for negligent injuries to his servants, and which make it his duty to supply that servant with reasonably safe tools and appliances with which to work and to warn him of sudden and unexpected dangers, were of judicial and not of legislative origin. It is only recently, indeed, that the world's parliamentary and legislative law has been in any sense of the word democratic. It falls far short of the ideal even to-day. In the past the members of these bodies have come almost exclusively from the aristocratic classes. Even to-day the legislator is generally a representative merely. He belongs to a class. He is a partisan. He is the advocate of, and is sent to the legislature to represent, a locality or an interest or an industry and to bring about results. He is a special pleader and an advocate. His main duty often is to secure appropriations. If he fail in these respects he will make powerful and bitter enemies and will lose many votes. The legislator who seeks really to reform the law and to bring about an era of impartial justice, has but few active supporters. He comes back to his constituents with an accumulation of but little vote-securing ammunition. His supporters are not of the militant kind. They are not immediately interested in politics. There is no money in it for them. They are not vindictive and aggressive. The tradition of the bench, on the other hand, is impartial justice. The appellate courts are courts of equity as well as of law. The judge comes to look upon himself as the trustee of all. His very position brings with it an ethical stimulus. It is for him to do equity and justice and to administer justice without prejudice and with an impartial hand. The early chancellor was known as "the keeper of the king's conscience." It is seldom that a judge fails to be broadened and humanized by these ideals. The courts, indeed, have reflected the dominant sentiments of the majorities, while the individual legislator has generally thought only of his own constituents or of his immediate and personal interests. If the test of democracy is the carrying out the will of the majority, it is difficult to see how government by committee could be made more democratic than has been the government by the courts. It is a noticeable fact also that so far the Supreme Court of the United States has nullified only one labor law.

trolling political power is also to be found in the hands of the trained, and usually idealistic, military, naval and professional classes, and the business ideal has seldom been the uppermost. The English gentleman is trained in an atmosphere of chivalry, of service, and of noblesse oblige, and though he has been class-conscious, he has always been taught to believe that the battle for the "under dog" is, after all, the only battle that is worthy of his steel. He, too, has not been in business, and business ideals do not appeal to him. He, as a matter of fact, has been taught to look down upon and to despise the business man. No little of the betterment of the condition of labor in England, indeed, can be traced to the fact of the division on class lines between the business man and the gentleman, and the willingness of the latter, on class, if on no other considerations, to aid the laboring man with whom he sympathizes, even though he may not associate, against the business man with whom he neither sympathizes nor associates. Even in Russia (and in Russia we find employers' liability acts), the conditions are radically different from those which exist in America. The government of the country is in the hands of a landed aristocracy whose estates are worked by tenants rather than by laborers and who, both on this account and on account of the fact that the use of modern farm machinery is as yet uncommon, feel but little fear of personal liability. Its members, at any rate, have the political control and can see that the scope of the employers' liability acts is not generally extended and is confined to the manufacturing and urban industries. They are anxious to keep the serfs in subjection. This they can do by keeping them in ignorance. The working man in the cities is more turbulent and must be appeased in some other way. The Employers' Liability Act in Russia, in short, is the sop which the landed aristocracy is giving to the working man of the city to keep him quiet, and is a sop which costs the former nothing, as they do not belong to the business class. In none of these countries, also, are there to be found written individualistic constitutions, and in all of them the necessity of an adequate national defense has made a large measure of governmental paternalism not merely common, but absolutely necessary.[8]

[8] "In Germany the whole matter is handled by a department of the Government, which operates a plan of compulsory industrial insurance. Every employer must insure with the Government all his regular employees whose annual wage is less than $500. Each employee is enrolled in a "Trade Assembly" embracing all workmen in that class of work, and his employer pays into the fund of such particular 'Trade Assembly' a certain per cent. of the total average annual wages of such employees,—the payment varying according to the hazards of the occupation. When an accident occurs, the Government's Insurance Department takes charge of the man, provides surgical attention and hospital service, and pays certain monthly sums so long as his disability con-

In America, on the other hand, the individualistic note has always been the uppermost. Ours has been the individualism of the frontier, the individualism of a people who have left behind them the ties of race and family history and who have been unchecked by reverence and tradition. We have been a nation of small landed proprietors and of struggling business men. Here the bourgeoisie has been enthroned. The ordinary farmer and manufacturer and business man is perfectly willing to sanction an employers' liability act which is confined in its operation to the railroads and to the great industrial combinations. He is bitterly opposed, however, to any measure which shall be general in its nature and apply equally to all "hazardous occupations." The ordinary business man has an elevator in his store. Every manufacturer, whether great or small, operates dangerous machinery. In the small town the struggling local street car line usually numbers the majority of the local business men among its stockholders. The farmers own and operate threshing machines, harvesters, mowers and other dangerous machinery, the use of which they are compelled to intrust to unskilled farm laborers. The opposition to general employers' liability statutes, indeed, is general and united because the fear of liability is common, and even a small charge is often disastrous to a small employer. Unless these statutes are reasonably general in their nature we can hardly expect that they will be sustained by the courts. Many large employers of labor, it is true, are coming to see their wisdom, but to the small employer they

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tinues. If he dies, it provides for his funeral and gives a certain pension to the members of his family dependent upon him. Employees who receive $500 or more a year, or who are employed temporarily, or outside any specified class, are insured only at their option and by making a monthly contribution from their wages. The employer is not required to make any provision for them, but has only his legal liability, if any, to meet in case of accident. Against this he can protect himself, as the employer often does in this country, by insuring in a private liability insurance company.

"The Government Insurance Department, in dealing with insured employees, has a fixed scale of compensation quite similar to that of the accident insurance companies of this country. Each permanent disability has its fixed compensation, being a certain specified per cent. of the workman's average wages. In case of death, his family receive an amount equal to his average wages for a certain period, as two or three years. Of course, the per cent. varies according to the occupation. The loss of the left hand, for example, is relatively a smaller disability for a clerk than for a workman.

"In Russia the law casts the burden for all injuries to employees while on duty, except those due to the fault of the employee, himself, directly upon the employer. And it gives to such employee—or, in case of his death, to his dependent relatives,—a lien on the factory for payment of damages that have been or may be, recovered, and for the payment of any pension which may be fixed by a judgment of the court with the consent of the plaintiff, or agreed upon between the parties.

"The English Employer's Liability Act, like the Russian, provides for a change in the rule of liability, rather than for a scheme of industrial insurance—which takes and keeps the subject of compensation for accidents out of the courts." (See Address of Edgar A. Bancroft before the Illinois State Bar Association, Chicago Legal News, vol. 42, no. 47, p. 375).

still appear to be full of danger. The tendency and desire, indeed, to "dignify property above human life" is not peculiar to the railway companies or to the courts, and in the nation at large, employers' liability acts which are in any way comprehensive in their scope and application, can, and for a long time will, be passed by the legislatures only where the labor vote is strong and controlling, and where the legislators are satisfied that the courts will sooner or later declare them unconstitutional.[9]

To justify these acts an insistence must be had upon an elastic construction of the constitutions, and the premise must be adopted that although those instruments did not guarantee any rights or privileges which were not enjoyed at the time of their ratification or adoption, they certainly did not guarantee that all uses of liberty and of property then indulged in should be perpetuated, nor did they guarantee the existence for all time of the morality and the civic and social conscience then existing. The theory of Mr. Bryce must be adopted, when he said that "The American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it and therefore in its own spirit." An insistence must be made upon the fact that the ethics of the times have changed; that the state is becoming a protector as well as a lawgiver, a guardian as well as a policeman, and that the term "unreasonable" must be construed in this light. So, too, the premise must be conceded (and this is a premise far reaching, revolutionary in its logical results) that no man, no master, no owner of property has a natural or constitutional right to manage his business or his property as he pleases; that where human life and health and the welfare of society as a whole—in which the individual, however humble, is an important element—are concerned, the factory and the workshop and the store and the mine are not castles nor sacred, whether the home be or not; and that all businesses in which lives are risked or morals are affected, or social happiness and prosperity are at stake, or the welfare of the state as a whole is involved, are to that extent affected with a public interest and are fit subjects for governmental regulation, inspection, and control. This is a new theory of government for the individualistic Englishman of the old school. It is a theory which is still more difficult of adoption by the individualistic and commercial American. It is the theory that the duty of the citizen does not merely involve the duty to support the state, to keep the king's peace, and to refrain from acts which under the rude code of the past were deemed to involve moral turpitude, but in a large measure to be a

[9] See note 7, ante.

gentleman, and to care for, protect, and diligently guard the health and welfare of others, of employees, of visitors, of customers, and of the public at large. It is a step in the direction of making the moral code of the New Testament the basis of the criminal law and of the law of the land. Acts of the kind in question are naturally accepted later in frontier and semi-frontier, than in well settled communities. Pioneers are pre-eminently individualists. He who lives upon the frontier can do much as he pleases; he comes but little in contact with his fellowmen; it is not difficult for him to so use his own that he injures not that of another, because he rarely comes in contact with that other, and he consequently acquires the habit of doing as he pleases. He naturally rebels and chafes when collectivism and its rules and limitations are thrust upon him. This is the reason why criminal prosecutions were proportionately so numerous in our western states during the formative period of their growth.

There can be no doubt that the American colonist, at the time of the revolution, was an intense believer in personal rights and in personal liberty. The keynote, indeed, of all English revolutions up to that time had been individualism, and this idea was carried further in America than anywhere else. Everywhere in America was to be noted a militant individualism which was not merely the revolution of a high-spirited people against the feudalism of the past and the assertion of arbitrary power by an alien parliament, or against the refusal of the right of representation which that feudalism upheld, but the individualism of the Calvinist, the individualism of the frontier and the individualism of the self-supporting landed proprietor. The several states were jealous of their individual liberty and their respective citizens were equally jealous of their personal liberty. Up to and including the struggle in America, the whole growth of the English revolution (in which the war in America was merely a chapter) was a story of individualism, but an individualism which was hardly altruistic. The colonists in America were insisting upon the recognition of the same theories of constitutional government which Oliver Cromwell insisted upon in his struggle against Charles I., and to which the English people at a later period made William III. subscribe. Neither the barons who met at Runnymede, nor the Roundheads who fought at Naseby, nor the Puritans who landed at Plymouth Rock, nor even the American revolutionists themselves, had any broad realization of the solidarity of mankind or of the doctrine of human rights which fired LaFayette and which so dignified the earlier stages of the French Revolution. They wanted liberty, but they wanted it for themselves; they wanted freedom of worship, but they wanted it for themselves alone. The barons of Runny-

mede demanded the privileges granted for "the freemen" of England alone, and at that time seventy-five per cent. of the population were in the thralls of serfdom. The Puritans of the old and the newer England were almost as merciless in their persecutions of those who did not conform to their particular religious beliefs as were the Spanish inquisitors themselves. They rarely got beyond the idea of a small religious or industrial unit. The merchant classes of Liverpool, of Bristol, of Boston, and of Newport, were perhaps more active in and reaped more plentiful harvests from the African slave trade than did the inhabitants of any other cities. Our government, indeed, sprang into existence when the individualistic idea was at the uppermost, but at a time when the idea of a human brotherhood was but little understood. It was founded in an age when the forms of modern industry were evolving and the Ricardian and laissez faire schools of social and political thought were generally popular. It was the era which antedated the English factory laws, an age of slavery and of bonded servants. Even half a century later those who protested against the iniquities of the English factory and mining systems were branded as anarchists and as socialists. It was an age of personal as opposed to public rights, of a personal as opposed to a public conscience. It is not to be wondered at that we as a people and the legal structure which we have created should have been unsocial and individualistic. The growth of a sane collectivism, of a civic and social, as opposed to a personal conscience, and of a generous altruism in the law has been reserved for these later days.

But have we, and has the New York Court, and have our courts generally, really understood the meaning and the qualifications of the terms liberty and property as they have been used in our constitutions? Is there, after all, any absolute right of property? Are there any inalienable rights which can be pigeon-holed, classified and defined? Is not every right subject to the paramount right of the public weal, and has not the right of private property itself as opposed to communism, merely been conceded because it is deemed to promote industry and virility and to be the best social policy? The rights to liberty and property, indeed, have always been relative, and whenever the unlimited exercise of those rights has been deemed injurious to the public welfare they have been modified and restrained or permitted only under certain conditions. The tradesman in England was from an early time under the royal protection and the free burghs or trading and manufacturing cities were the recipients of royal charters. Every extra-hazardous occupation is a business which is affected with a public interest. It would be difficult

to prove that the right to manufacture and to trade under the protection of organized society was ever a vested right. Try as we may, indeed, we cannot get away from the theory, if not the fact, of a social compact. No business man could remain in business a year unless the law protected his property and the courts enforced his contracts, but back of the courts and necessary to the enforcement of their mandates are the strong right arms and the bayonets, if necessary, of the organized public. It is idle for one to say that he has natural and inalienable rights in the conduct of a business which is dangerous to human life and whose very existence depends upon the public for support and for protection. It is a question of reasonableness and of necessity merely. We can concede that every restriction on individual liberty which is not reasonably necessary for the public welfare is a deprivation of property without due process of law and a denial of the equal protection of the law. But we do not find in the law any category of inalienable rights. The only inalienable right, indeed, is the right to do as one pleases and without condition or restraint so long as the welfare of the community does not require a restriction upon that liberty and the imposition of conditions upon its exercise. The right to trade and carry on business has almost always been coupled with conditions, and the protection of the state has usually been given only in return for loyalty and service. It was feudalism which brought order out of chaos in England and laid the foundations of the English state, and the feudal idea was one of public service. It is true that originally the class idea largely prevailed in the law of England, and that the natural selfishness of the dominant military aristocracy imposed the earlier restrictions and limitations almost entirely upon the lower and laboring classes. But this was and could be only for a limited time. As the democratic idea grew, and the state became more and more commercial and less and less military, the classes affected were extended, and the principles and theories by which the rich and powerful sought to justify their control over the serving poor afforded the justification for the control of the rich when they in turn came to be, as in the case of our great railroad magnates of today, the carrying and serving agencies of the community. Mr. Justice Werner does not state the historical truth when in his opinion in the New York case he intimates that at the time of the adoption of the American Constitution there was no common law liability where negligence could not be proved. From an early time the innkeeper and the common carrier were not merely compelled to accommodate and carry the goods of all, but were made almost absolute insurers of their safety. Their regulation was justified on the theory that they were engaged in public callings and

that their control redounded to the good of all classes, but much more upon the theory that they were accorded privileges and protection and owed to their lords and to the king something in return. They held their landed possessions from their lords and relied upon their lords for protection from highway robbers and from their other enemies. They were allowed to sue in the baronial courts and, later, in those of the king and of the realm. This protection was especially necessary to the common carrier whose route often lay over wild and robber-infested highways and bypaths. The aristocracy who imposed the regulations no doubt argued that they themselves had their duties to perform in the social organism, the duties of free military service to their sovereign and of protection to their tenants and retainers, and that their liberties were also restricted, only in another way. They no doubt argued that there was, or should be, a social duty on the part of those who could only labor and carry, to serve them and the public for a reasonable rate and in a reasonable manner, the same as there was upon themselves, the fighters, to don their armor when called upon and to follow the sovereign to battle, and to protect the poor from pillage and robbery. The whole feudal idea, indeed, was one of public service—a service perhaps culminating in a landed aristocracy and in a monarch, but in a social system in which the monarch was in a large sense the state. It was but a step to substitute the popular for the personal sovereign. It was from an early time, indeed, insisted that "the splendor and powers of the crown were attached to it for the benefit of the people and not for the private gratification of the sovereign," and "that the prerogatives of the crown were not given for the personal advantage of the king, but were allowed to exist because they were beneficial to the public." It is now quite generally conceded by the courts that a common carrier of passengers is not only liable for the exercise of a high degree of care in the carriage of its passengers, but is liable for flaws and defects in its cars and machinery, provided the manufacturer could have ascertained their existence by a high degree of care, but regardless of the fact as to whether the railway company itself (even after the most thorough examination), could have ascertained the defect after the same had been manufactured. Yet the New York Court holds that in order to render a common carrier liable to its employees there must be proof of some positive act of negligence on its part. Is, we may ask, the life of a passenger more sacred than is that of an employee? Even the doctrine of contributory negligence, as now understood, is comparatively modern in its origin and has frequently been modified by the rule of comparative negligence. It was not until 1837 that the defense of the

negligence of a fellow servant could be interposed, and that defense has recently been taken away from the railroads by the legislatures of many of our states and its deprivation has been sanctioned by the courts. Was freedom from that defense an inalienable right given by the constitutions to the employee or did the continuance of the rule after it was inaugurated become a vested right in the employer? The justification of employers' liability acts lies in the fact that they tend to prevent pauperism and the throwing upon the community of a helpless class of persons who are the wrecks of the modern industrial system and its direct result. It may possibly be that in this insurance (for the acts really create a system of industrial insurance), the state should take a hand and bear a part of the expense. It is difficult, however, to understand why the regulations are not within the domain of the legislative power even though no such aid is given. For, as we have before intimated, without the governmental sanction and protection, modern industry could not exist. The Supreme Court of the United States has recently sustained statutes which have provided for the compulsory guaranteeing of the deposits of state banks on the ground of the public necessity. In these cases bankers have been compelled to contribute to the general fund regardless of their culpability or negligence. It is difficult to see the distinction between a statute which seeks to compel an employer to provide insurance for loss of life or limb, and those which require an insurance for loss of bank deposits. The act, if invalid, is invalid because it lacks in reasonableness and in social necessity, and not because, if reasonable and necessary, it is beyond the scope of the legislative power.

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